

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN GREGORY BONNER,

Defendant-Appellant.

UNPUBLISHED

September 29, 1998

No. 202909

Recorder's Court

LC No. 96-003930

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twelve to twenty-five years' imprisonment for the assault with intent to commit murder conviction and to a consecutive two-year prison term for the felony-firearm conviction. He now appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by admitting hearsay evidence to rebut defendant's alibi defense. However, defendant failed to preserve this issue for review. To preserve an evidentiary issue for review, a party must make a timely objection to the admission of the evidence at trial, and must specify the same ground for the objection that is asserted on appeal. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). At trial, defendant objected to the admission of his statement to the police on the ground that it was improper rebuttal testimony. Defendant's objection failed to preserve his present challenge to the admission of the statement based on the hearsay rule. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Absent a proper objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). Because we are persuaded that the error defendant alleges on appeal is not a plain error affecting substantial rights, we decline to review this issue. Furthermore, defendant's statement was not hearsay because it was not offered to establish the truth of the matter asserted, but was offered to rebut the testimony of defendant's alibi witnesses. MRE 801; *People v Poole*, 444 Mich 151, 158-159; 506 NW2d 505 (1993).

Defendant next argues that the trial court abused its discretion in denying his motion for a new trial brought on the ground that the jury's verdict was against the great weight of the evidence. Specifically, defendant argues that the trial judge erred in failing to weigh the credibility of the witnesses when deciding the motion. We disagree. We review a trial court's decision on a motion for a new trial under the abuse of discretion standard. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Defendant relies on *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993) to support his position that the trial judge may evaluate the credibility of witnesses when deciding a motion for a new trial based on the great weight of the evidence, and may grant a new trial if he or she disbelieves the testimony of the witnesses for the prevailing party. However, the Michigan Supreme Court's recent decision in *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998), overruled *Herbert* to the extent that it permitted the trial judge to act as a "thirteenth juror" and authorized judges to grant new trial motions on the basis of a disagreement with the jury's assessment of witness credibility. When ruling on a motion for a new trial based on the great weight of the evidence, the trial judge may only grant a new trial if the evidence preponderates heavily against the verdict so that allowing the verdict to stand would be a miscarriage of justice. *Lemmon, supra*, 456 Mich 627. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'" *Id.* at 642. Contrary to defendant's argument, this case does not present the exceptional circumstance in which complainant's testimony was impeached to the extent that it was deprived of all probative value such that the jury could not believe it. *Id.* The evidence does not preponderate heavily against the verdict. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant's next argument is that the prosecutor improperly shifted the burden of proof to defendant by commenting, during her closing arguments, on defendant's failure to produce evidence that he was in the hospital on the night of the shooting. We disagree.

When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Because defendant did not object to the prosecutor's argument on the ground that it improperly shifted the burden of proof to defendant, appellate review of this issue is precluded unless the allegedly improper remarks could not have been cured by an appropriate instruction or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, the prosecutor's comments were proper comments on the alibi evidence presented by defendant, and did not shift the burden of proof to defendant. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Holland*, 179 Mich App 184, 190-191; 445 NW2d 206 (1989). Furthermore, we are convinced that any prejudice resulting from the remarks could have been cured by a timely instruction to the jury.

Defendant also argues that the prosecutor's closing argument improperly denigrated defense counsel. Again, because defendant did not object to any of the challenged remarks at trial, our review is precluded unless a curative instruction could not have eliminated the prejudicial

effect or where failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra*, 446 Mich 687. In this case, the prosecutor's remarks regarding defense counsel's style of questioning were not an improper personal attack on the credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Rather, the prosecutor merely argued that complainant was a credible witness, and that he had a reason for testifying in the manner in which he did. Furthermore, any prejudice resulting from the remarks could have been cured by an instruction to the jury.

Affirmed.

/s/ Roman S. Gibbs

/s/ David H. Sawyer

/s/ Martin M. Doctoroff